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No. 87-2048

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1989

TEXACO, INC.
Petitioner

v.

RICKY HASBROUCK, d/b/a RICK'S TEXACO, ET AL.
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF OF THIRTY-FIVE STATES AS
AMICI CURIAE IN SUPPORT OF RESPONDENTS**

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INTRODUCTION

The States of Alabama, Alaska, Arkansas, California, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Montana, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington and Wyoming (hereinafter the "Amici States") submit this brief in support of the respondents, retail gasoline dealers. The decision of the Ninth Circuit in *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034 (9th Cir. 1988), should be affirmed.

INTEREST OF AMICI STATES

The Amici States have a clear and strong interest in an interpretation of the antitrust laws, including the Robinson-Patman Act, consistent with sound policy and Congressional intent. The respective Attorneys General of many of these Amici States are charged with the responsibility of enforcing state antitrust provisions similar or identical to the Robinson-Patman Act.¹ Other states enforce price discrimination prohibitions under state unfair trade practice laws² or other related statutes.³ These various state laws are often construed in accordance with this Court's interpretation of their federal counterparts.⁴ Therefore, this Court's determination in this case will directly affect the Amici States' enforcement of state laws pertaining to price discrimination, and will have an impact far beyond the question of federal law presented herein.

¹ *E.g.*, Conn. Gen. Stat. § 35-45; Md. Comm. Law Code Ann. § 11-204(a)(3)-(5) (1983).

² *E.g.*, Me. Rev. Stat. Ann. tit. 5, §§ 206-213.

³ *E.g.*, N.C. Gen. Stat. § 75-5(b)(4) and (5).

⁴ *See, e.g.*, *Connecticut v. Exxon Corp.*, 1987-1 Trade Cas. (CCH) ¶ 67,579 (Conn. Super. Ct. 1987); *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 646 P.2d 988 (1982).

Moreover, the Attorneys General represent their states as common law *parens patriae* in federal antitrust actions, including price discrimination cases.⁵ The states play a major role in antitrust enforcement, and have a substantial interest in assuring that such trade regulation laws are interpreted in accord with antitrust policy and this Court's prior decisions.

The Amici States support the rationale of the Ninth Circuit that price discrimination in favor of nominal wholesalers vis-a-vis retailers operating within the same market is actionable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), where such price discrimination has the reasonable possibility of adversely affecting competition between such retailers and retailer-customers of such wholesalers.

SUMMARY OF ARGUMENT

1. Predicating a Section 2(a) Robinson-Patman Act violation upon lower price sales to wholesalers vis-a-vis retailers operating in distribution chains within the same market is fully consistent with the express statutory language of the Act. The touchstone of a Section 2(a) violation is not the functional level of the purchasers, but whether the discrimination has a "reasonable possibility" of affecting competition. The precise theory of the tertiary-line portion of respondents' case has been accepted by this Court in *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), and has long-standing support in the case law, commentary and legislative history of the Act.

2. Focusing analysis upon the effect of the discrimination rather than the nominal functional level of the purchasers is consistent with overall antitrust policy. It will not disrupt traditional distribution patterns. Rather, analysis of competitive effects would assure that prices charged by a dual-

distributing supplier promote, rather than retard, competition and efficient distribution.

3. As conceived in *FTC v. Morton Salt, Inc.*, 334 U.S. 37 (1948), the "self-evident" inference of injury to competition resulting from substantial price discrimination over time applies to cases involving discriminatorily lower prices to wholesalers. The *Morton Salt* rule establishes the substantiality of a price discrimination and creates a rebuttable presumption that competition may be affected. Such a presumption is important to effective antitrust enforcement and consistent with the specific burden of proof scheme of the Robinson-Patman Act. If a substantial "wholesaler" discount is a true functional discount, then the presumption can be rebutted by such a showing. Abrogation of long accepted rules of presumption and burden of proof will hamper effective enforcement and thwart statutory policy.

⁵ See, e.g., *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945); *Burch v. Goodyear Tire & Rubber Co.*, 554 F.2d 633 (4th Cir. 1977).

ARGUMENT

Section 2(a) of the Robinson-Patman Act prohibits price discriminations⁶ between two purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition . . . or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."⁷ 15 U.S.C. § 13(a).

I. DISCRIMINATION BETWEEN A WHOLESALER AND A RETAILER MAY SUPPORT A PRICE DISCRIMINATION CLAIM WHERE SUCH DISCRIMINATION MAY ADVERSELY AFFECT COMPETITION AMONG RETAILERS.

The principal question presented here is whether lower prices to wholesalers than to retailers operating within distribution chains in the same market can ever support a Section 2(a) violation. Texaco contends that the denominated functional level of the recipients of the disparate prices is determinative. However, even a cursory reading of the language of the Robinson-Patman Act and the vast body of its jurisprudence demonstrates that the critical inquiry is *not* the functional level of the purchaser but, rather, whether the price discrimination may affect competition. The Robinson-Patman Act does not require that the direct purchasers be in head-to-head direct competition with one another;⁸ it merely requires

⁶ A price discrimination is merely a price difference. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550-51 (1960); *FTC v. Morton Salt, Inc.*, 334 U.S. 27, 45 (1948).

⁷ Since Section 2(a) is prophylactic in nature, actual harm to competition is not required to establish a violation; a "reasonable possibility" of such harm is sufficient. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 (1983).

⁸ Indeed, the statutory language of Section 2(a) is directly to the contrary. See footnote 14 *infra*.

that competition as described in the Act may be adversely affected by the discrimination.⁹

Sales favoring wholesalers and disfavoring retailers, through unjustified functional discounts or otherwise, may have the requisite anti-competitive effect. As one noted commentator has explained:

At first glance, it may appear that concerns performing different functions are not in competition with one another and that, therefore, discrimination among them cannot hurt competition. However, damage to competition might result from functional discounts at three competitive levels. First, a seller might use such discounts for a discriminatory attack on his competitors and thereby injure competition in the primary line. Second, two or more functional classes of distributors might be differentiated by characteristics that did not prevent them from competing for the same customers, and discrimination among them might adversely affect that competition. *Third, though the functional classes receiving the discounts might operate at different distributive levels, as do wholesalers and retailers, the customers of one class might be in competition with the members of the other, as retailers who buy from wholesalers are in competition with retailers who buy directly from the manufacturer; and the relative size of the functional discounts might be such as to affect the relative opportunity of those customers.* The statute applies whenever competition is damaged by discrimination in any of these ways, regardless of the purposes that may underlie the discount structure A discrimination is unlawful if all or part of a disfavored class of customers may be injured.

⁹ Once injury to competition is established under the Act, a plaintiff seeking damages pursuant to Section 4 of the Clayton Act must still establish that it suffered antitrust injury. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). Once antitrust injury is established, however, precision in fixing the amount of damages is not required. See *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969).

C. Edwards, *The Price Discrimination Law*, 287 (1959) (emphasis added). See also C. Austin, *Price Discrimination*, 51-57 (2d ed. 1959).

The third category of competitive harm described above is termed "third line" or "tertiary line" injury.

The so-called 'third line' injury concept comes into play only when the supplier favors his distributors, whose customers compete with other purchasers from the supplier, whereby competition with the customer of the purchaser may be impaired.

Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950 (D. Conn. 1966) quoting F. Rowe, *Price Discrimination Under the Robinson-Patman Act*, 196 n.97 (1962). A portion¹⁰ of the respondents' claim here is that Texaco's discrimination in favor of nominal wholesalers Dompier and Gull had the requisite tertiary line effect.

Courts have long recognized that discriminatory prices charged to retailers vis-a-vis wholesalers may be an illegal discrimination so long as there is the requisite effect on competition, including third-line competitive injury. *E.g.*, *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds* 340 U.S. 231 (1951); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn. 1966); *Krug v. International Telephone and Telegraph Corp.*, 142 F. Supp. 230 (D.N.J. 1956); accord C. Austin, *Price Discrimination*, 51-57 (2d ed. 1959).¹¹

¹⁰ Portions of respondents' claims also center on second line injury occasioned by Dompier's and Gull's activity as retailers. Texaco has focused its appeal entirely upon the tertiary line aspects of this case.

¹¹ Texaco and its supportive amici take seemingly relevant language from several lower court decisions suggesting that price discrimination between different functional levels is not actionable. *E.g.*, *Texaco Br.* at 19 n. 28.

(continued)

Moreover, it matters not whether the price discrimination favors the wholesaler or the direct-buying retailer. Thus, price discriminations involving lower prices to direct-buying retailers have been consistently held illegal, despite the disparate purchasers being at different levels of the distribution chain. See, *e.g.*, *FTC v. Morton Salt Co.*, 334 U.S. 37, 41 (1940); *Jones v. Metzger Dairies, Inc.*, 334 F.2d 919, 924-25 (9th Cir. 1964) *cert. denied*, 379 U.S. 965 (1965) ("It is not necessary that the purchasers involved must be on the same distributive level. A violation . . . may occur when a manufacturer sells . . . to a retailer at a lesser price than that charged to a wholesaler whose customers compete with the retailer"); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 701-02 (9th Cir. 1964); *Krug v. International Telephone and Telegraph Corp.*, 142 F. Supp. 230, 235 (D.N.J. 1956) ("There can be no doubt that a violation of Section 2(a) may occur when a manufacturer sells his products to a retailer at a lower price than that charged to a wholesaler whose customers compete with the retailer.")

Similarly, courts have not hesitated to find illegal price discrimination where the supplier charged higher prices to direct-buying retailers than to wholesalers. See, *e.g.*, *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949). In *Standard Oil v. FTC*, the Seventh Circuit affirmed the Federal Trade Commission's finding that Standard Oil violated the Robinson-Patman Act by charging discriminatory prices in a fact

¹¹ (continued)

However, even a casual reading of those cases makes clear that the critical inquiry is whether the price discrimination may affect competition, not the functional level of the purchasers. For example, *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976) focused inquiry on the possibility of competitive effect, finding none because the disparate purchasers operated in "separate distinct market[s], open only to a single producer." *Id.* at 1067. The other cases relied upon by Texaco also do not support the broad dispositive proposition for which they are misleadingly cited. See discussion of this point in *Br. of United States on Petition for Certiorari* at 13 n.15.

pattern similar to that alleged in this case.¹² Standard Oil sold gasoline to direct-buying retailers at prices higher than that charged to "jobbers" who resold to retailers competing with the direct-buying retailers. Despite the jobbers and direct-buying retailers being at different levels of the distribution chain, the Court found ample competitive harm since jobbers could favor their retailer customers who would in turn gain a competitive advantage over direct-buying retailers. As the Seventh Circuit put it, the discriminatory prices that Standard Oil charged to direct-buying retailers vis-a-vis jobbers gave "a club to its wholesalers which they passed on to their retailers to bludgeon their competitors." 173 F.2d at 216.¹³

This Court, following the clear direction of the statutory language and prior case law, also has confirmed the violation of Section 2(a) based upon sales to wholesalers at lower prices than to direct-buying retailers. In *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969), Standard Oil sold gasoline to Perkins, a large direct-buying retailer, at prices higher than gasoline sold to Signal, a wholesaler. Signal in turn sold the gasoline to another wholesaler who sold the gasoline to Regal, a retailer in competition with Perkins. Before deciding that even this series of transactions constituted a Robinson-Patman violation, this Court affirmed that discriminatory sales to wholesalers and retailers are illegal when they have the requisite competitive effect at the retailer level. *Perkins* succinctly states:

¹² A significant dissimilarity between *Standard Oil* and the instant case is the strong evidence here that the "wholesalers" often performed virtually no wholesaling functions. For example, Gull had no bulk plant in the Spokane area. J.A. 379.

¹³ Actual passing on of the discriminatory discount is not necessary to have the requisite effect for purposes of liability under Section 2(a). It is enough that the discrimination makes such competitive effect a reasonable possibility. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); accord, *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 679-80 (5th Cir.), cert. denied, 382 U.S. 959 (1965); *Standard Oil Co. v. FTC*, 173 F.2d at 216.

Signal . . . was able to insist upon a discriminatorily lower price. Had Signal then sold its gas directly to the Regal Stations, giving Regal stations a competitive advantage, there would be no question . . . that a clear violation of the Robinson-Patman Act had been committed.

Id. at 647-48.¹⁴

The propriety of applying the Robinson-Patman Act to discrimination between purchasers at different levels of distribution chains has its roots in the very genesis of the Act. When the Robinson-Patman Act was originally proposed in both the House and Senate, Section 2(a) contained a proviso that:

nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture.

H.R. 8442, 74th Cong., 1st Sess., June 11, 1935; S.3154, 74th Cong., 1st Sess., June 26, 1935. Thus, the bill originally

¹⁴ This Court, in other contexts as well, has specifically observed that Section 2(a) of the Act may be violated by discriminatory sales to purchasers at different functional levels.

[W]hen Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act [15 U.S.C. § 13(a), the Robinson-Patman Act]

FTC v. Fred Meyer, Inc., 390 U.S. 341, 356-57 (1968); accord, *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1983); *FTC v. Sun Oil Co.*, 371 U.S. 505, 514 (1963) ("in § 2(a) . . . the intent to give broader scope was expressly effected by the prohibition of price discriminations which, *inter alia*, adversely affected competition not only with the seller who grants the favored price, but with the knowing recipient thereof and with customers of either of them").

exempted discrimination between different levels of the distribution chain. However, when Congress passed the Robinson-Patman Act, it deleted this exemption, making clear that the Act's reach was broad, and that the statute was intended to apply even to discriminations between different levels of the same distribution chain. The legislative history of the Act demonstrates a clear movement away from a statutory framework that allowed wholesalers and their retailer customers unwarranted advantages over direct-buying retailers. See generally, J. Palamountain, *The Politics of Distribution*, 228-30 (1955).

This Court's consistent recognition, confirmed by statutory language and legislative history, that price discrimination may have the requisite anti-competitive effect at any level of the distribution chain, makes it clear that Robinson-Patman liability may attach even when the favored and disfavored purchasers are not on the same functional level. *Perkins* is sound and controlling.

II. APPLICATION OF PLAINTIFFS' THEORY WILL NOT DISRUPT TRADITIONAL DISTRIBUTION PRACTICES.

In order to escape the clear and compelling precedent establishing the viability of respondents' theory of liability, Texaco offers the Court a parade of horrors. Essentially, Texaco claims that the supplier-wholesaler-retailer chain, a "traditional" method of distribution, will be destroyed.¹⁵ Your amici assert that application of Robinson-Patman requirements will not disrupt such distribution.

¹⁵Texaco is simply wrong when it further suggests that so-called dual-distribution — whereby a supplier sells to both wholesalers and retailers in the same market — is essential to this traditional pattern of distribution. In fact, such dual-distribution is not even the dominant practice in the gasoline industry. See, e.g., F. Allvine and J. Patterson, *The Marketing of Gasoline*, 55-56 (1972).

Texaco has lawful options consistent with traditional distribution patterns which would not create Robinson-Patman exposure. For example, Texaco could cease dual-distribution and, in a given market, distribute solely to wholesalers, who in turn would sell to retailers or it could distribute directly to retailers only. Several of its competitors have chosen this option.¹⁶ Alternatively, *Texaco could continue dual-distribution in a lawful manner*. Functional discounts to different functional levels of the distribution chain are permissible to the extent that the discounts are reasonably related to the cost savings to the supplier of having a wholesaler perform certain functions (e.g., stocking, delivery, marketing and sales services). See, *Mueller Co.*, 60 FTC. 120 (1962), *aff'd*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964). The wholesaler profits only if it provides such functions more efficiently than the supplier, thus assuring that dual distribution adds efficiencies to the market (or at least does not create inefficiencies). To the extent they are cost-justified,¹⁷ functional discounts are lawful.¹⁸

¹⁶See, F. Allvine and J. Patterson, *supra* note 15 at 55-56.

¹⁷Such cost-justification is an affirmative defense as to which the defendant carries the burden of proof. See, *Morton Salt Co. v. FTC*, 334 U.S. 37, 48 (1948). The Ninth Circuit found Texaco's proof concerning a cost-justification of its wholesaler discount to be "clearly inadequate." 842 F.2d at 1039.

¹⁸Texaco's principal complaint is that in order to avoid Robinson-Patman liability it must account for the costs and market conduct of its purchasers. Texaco Br. at 19-28. This is untrue. If Texaco cost-justified its functional discounts, as suggested above, it would be in full command of all information necessary to escape liability — the amount of its own costs of providing wholesaling functions.

If Texaco opted not to cost-justify its discounts, then of course Texaco could attempt to avoid liability by demonstrating a lack of possibility of competitive injury by tracing its purchasers costs or selling prices. See, *Doubleday & Co.*, 52 FTC. 169 (1955); but see, *Mueller Co.*, 60 FTC. 120. But such a burden would be undertaken by Texaco's own choice.

Application of Section 2(a) to a wholesaler discount, therefore, does not upset the traditional hierarchy of distribution.¹⁹ It only requires that Texaco cost justify its dual-distribution practice or return to the traditional practice of single distribution in a given market.

III. APPLICATION OF THE MORTON SALT RULE IS APPROPRIATE HERE.

This Court has consistently held that a substantial price differential over time demonstrates *prima facie* evidence of injury to competition under the Act. *FTC v. Morton Salt*, 334 U.S. 37, 47 (1948); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437 (1983); accord, e.g., *National Dairy Products Corp. v. FTC*, 395 F.2d 517, 521 (7th Cir.), cert. denied, 393 U.S. 977 (1968).

This rule recognizes that the competitive injury component of a Section 2(a) claim is designed to arrest harmful discrimination in its incipency, before it achieves its *full* potential for competitive injury. Meeting the *Morton Salt* rule establishes the substantiality of the price discrimination, and thus creates the "self-evident," "reasonable possibility" that the unjustified price discrimination may have a harmful effect on competition.

¹⁹The Court in *Standard Oil v. FTC*, likewise rejected the contention that prohibition of non-cost-justified discriminatory prices to wholesalers vis-a-vis retailers, would place an undue burden on business. The Court noted that in order to conduct lawful business:

[T]he petitioner may . . . discontinue selling to wholesalers at a price different than that made to retailers. The petitioner's three largest competitors in Detroit have found it agreeable to do so. The petitioner argues that this is an elimination of wholesalers. If this be true, it is elimination only where their existence cannot be justified except on the exploitation of a differential in price not justified by any cost savings to obtain that price. This does not impress us as either illegal, unwarranted or unjust.

173 F.2d at 217.

This presumption of competitive injury by substantial price discrimination is designed to enhance "effective enforcement of the Act." *FTC v. Morton Salt Co.*, 334 U.S. at 50. Such presumptions have long been employed by this Court to allow efficient enforcement of the antitrust laws in areas of long-standing Court experience. E.g., *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (*per se* rule essential to effective enforcement); *NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 109-10 (1984) (unjustified restraint on output carries presumption of competitive harm). The presumption is also consistent with the specific statutory scheme of the Robinson-Patman Act. Under Section 2(b) of the Act, 15 U.S.C. § 13(b), the burden is upon the price discriminator to show that the price discrimination did not have the reasonable possibility of injury to competition. *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir. 1945).²⁰

For forty years, the *Morton Salt* rule has proven sound in policy and practice. Texaco has advanced no reason to abandon this proven precedent. Texaco's only contention is that there was no competitive harm. However, the Ninth Circuit found that the respondents fortified the *Morton Salt* presumption with facts of actual injury, 842 F.2d at 1041, while Texaco failed to demonstrate the absence of such injury. Under the circumstances, there is no reason to reconsider the efficacy of a presumptive rule that has worked well for forty years.

²⁰The *Moss* rule for seller liability was cited with approval by this Court in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 78-79, 79 n.22 (1953), although it was rejected for use to establish buyer liability.

CONCLUSION

For the foregoing reasons, the Amici States urge this Court to continue to approve enforcement of the Robinson-Patman Act against unjustified price discrimination favoring wholesalers over direct-buying retailers where it is reasonably possible that competition will suffer. The Ninth Circuit's judgment should be affirmed.

Respectfully submitted,

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